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Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

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SUPPLEMENTAL BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

The interest of the *amici* is set forth in their prior brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the question of the extent to which state and local governing power is protected against federal regulation by the Tenth Amendment. The current standard for measuring such protection is the three-pronged test developed under *NLC v. Usery*, 426 U.S. 833 (1976).

The present case was argued to the Court last term. *Amici*, who represent the governors, state legislators, cities and counties of the nation, filed a brief expressing "grave reservations as to whether the three-pronged test provides satisfactory criteria for determining whether state and local power is protected under the Tenth Amendment." *Brief for the National League of Cities, et al.*, at 15. *Amici* said the three-pronged test creates serious intellectual and practical difficulties, and that state and local power almost never survives under it. The consequence, argued *amici*, is ever increasing centralization of power in the national government, with concomitant diminution in state and local power—a result eschewed by principles of federalism. *Id.* at 15-16, n.7. However, *amici* did not further develop their criticisms of the three-pronged test, but instead stated that they would present their views in appropriate future cases. *Ibid.*

On July 5, 1984, the Court set this case for reargument. The Court requested supplemental briefing on the question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?" In this brief *amici* are therefore stating their views on

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

appropriate standards for judging state and local immunity under the Tenth Amendment.[2]

In summary, *amici's* position is this: The Framers of the Constitution deliberately established a federal system in which effective governing authority is divided between the national government and the states. This division of power was considered essential to avoid a dangerous centralization of authority in the federal government, and is a vital component of the system of checks and balances. The power of the federal government and of the states must both be respected. Neither can be permitted to impair the other; neither can be extended to the point where it gravely harms the other. Thus, where there is a clash between them, they must be harmonized by means of a balancing process. Under this process the Court must first determine whether a challenged federal law or regulation impairs the ability of states to effectively exercise their governing authority. If it does so, the federal action must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority.[3]

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[2] Two of the *amici*, the National League of Cities and the National Governors' Association, were parties in *NLC v. Usery*, and thus have a longstanding interest in judicial application of the Tenth Amendment.

[3] The position urged by *amici* is very close to or identical with that expressed in Justice Blackmun's concurring opinion in *National League of Cities, supra*, and to views expressed by Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, in a concurring and dissenting opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982). Justice Blackmun favored a balancing approach which allowed the exercise of federal authority where there is a strong and demonstrable federal interest that necessitates state compliance. 426 U.S. at 856. Justice O'Connor said that, in determining whether an asserted federal interest justifies state submission, the Court must consider "not only the weight of the asserted federal interest," but also "the necessity of vindicating [it] in a manner that intrudes upon state sovereignty." 456 U.S. at 781, n.7.

ARGUMENT

I. The Constitution Establishes a Federal System in Which the Powers of the National and State Governments Must be Harmonized by Means of a Balancing Process

A. *The Framers Created a Federal System in Which the National and State Governments Each Have Effective Governing Authority*

1. The Framers of the Constitution created a federal system of government. They divided governing power between the national government on the one hand, and states on the other. The national government and the states were each to have effective authority within their spheres.

This concept of federalism is part of the fabric of the Constitution. As stated by the Solicitor General, "the federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter." *Supplemental Brief for the Secretary of Labor* (hereinafter "*Supp. Br. Sec.*"), at 3.

The Tenth Amendment, under which this case arises, reflects the federal nature of our system. But it is only one manifestation of the pervasive principle of federalism. This, too, was recognized by the Solicitor General, when he said "[t]he Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound." *Supp. Br. Sec.* at 4.

Because the Framers desired a federal system in which the national and state governments would each have effective authority, they expressly delegated certain powers to the national government, while reserving to states a vast realm of authority over the day to day affairs of the body politic. This was explained by James Madison:

> "The powers delegated . . . to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *The Federalist No. 45*, p. 313 (J. Cooke ed.1) [Madison].

Thus, under the Constitution, states have a wide area of governing authority.

2. There were several reasons why the Framers created a federal system in which the states possess extensive authority. Though the Framers believed the national government has to perform functions that individual states could not effectively perform themselves—such as conducting foreign affairs and regulating commerce between the states—they also feared centralized national authority. As colonists they had been subjected to concentrated power, and had grown " 'suspicious of every form of all-powerful central authority.' To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government." *FERC v. Mississippi*, *supra*, 456 U.S. at 790 (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

Related to the Framers' fear of centralized power was their desire to ensure liberty. Division of power between national and state governments was therefore relied upon as an important safeguard of freedom (as was the division of power within the national government itself). These divisions of power, as Justice Powell has stated in regard to the divisions among the three branches of the national government, are part of the "system of checks and balances." They are "far more central to the larger perspective than any single power. . . ." *EEOC v. Wyoming*, —— U.S. ——, ——, 103 S.Ct. 1054, 1076

(1983) (Powell, J., dissenting). Unless the divisions of power are "zealously protected[ed] . . . we risk upsetting the balance of power that buttresses our basic liberties." *FERC v. Mississippi*, *supra*, 456 U.S. at 790 (O'Connor, J., concurring in part and dissenting in part).

The Framers also believed that state governments are closer to the people than the national government. State governments often have a greater understanding of their citizens' needs and, unlike Congress, can tailor laws and regulations to a host of diverse local requirements. This was extensively pointed out by the Chief Justice in *EEOC v. Wyoming*, *supra*, —— U.S. at ——, 103 S.Ct. at 1075 (Burger, C.J., dissenting).

Finally, though the Framers themselves did not explicitly consider the point, history has shown that the governing powers of states enable them to serve as laboratories for devising solutions to pressing problems. Such solutions often are adopted later by other states or the national government. In the seminal words of Justice Brandeis, "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting).

B. *The Powers of the National Government Must be Construed in Light of the Powers of the State Governments and Vice Versa*

Because the Constitution establishes a federal system with checks and balances, the powers of the national and state governments cannot be viewed in isolation from each other (just as the powers of the three branches of the national government itself cannot be viewed in isolation from each other). Rather, the powers of the national government must be construed in light of the powers of state governments and vice versa. This is only the more true because the national and state governments some-

times have concurrent power over a subject, *e.g.*, concurrent power exists over aspects of interstate commerce.

Construing the powers of one organ of government in light of the powers of another is an established and necessary mode of constitutional interpretation. It has been adopted in major constitutional cases involving powers of branches of the federal government, such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *New York Times Co. v. United States*, 403 U.S. 713 (1971); and *United States v. Nixon*, 418 U.S. 683 (1974). It has also been adopted in cases involving a clash between state and national powers. In litigation involving the Twenty-first Amendment, for example, the Court has said that "'[b]oth the Twenty-first Amendment and the Commerce Clause are part of the same Constitution [and] each must be considered in light of the other.'" *Bacchus Imports, Ltd. v. Dias*, No. 82-1565 (June 29, 1984), slip op. at 11, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (brackets in original). "The mode of analysis to be employed" must therefore be a "'pragmatic effort to harmonize state and federal powers.'" *Ibid.*

Construing the powers of one organ of government in light of the powers of the other is necessary to preserve the constitutional plan. Absent such construction, the powers of one organ might be construed so broadly as to defeat or even obliterate the powers of another. The possibility of such an encompassing, cannibalistic interpretation of one set of powers was specifically recognized by this Court in regard to the war powers, when the Court said that "if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress, but largely obliterate the Ninth and Tenth Amendments as well." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

What is true of the war power is also true of other federal powers such as the commerce power. Though the interstate commerce clause originally covered only com-

merce which actually moved between the states, and was designed simply to prevent discrimination and remove trade barriers, it now covers any activity which remotely affects interstate commerce. And there is virtually nothing which cannot be said to affect interstate commerce in some way. Thus, if the federal commerce power can *ipso facto* override state authority, and need not be harmonized with state power, then the commerce power will "largely obliterate the Ninth and Tenth Amendments" and the entire concept of federalism as well.

The same all consuming, destructive capacity also inheres in the spending power. This was elaborated in *amici's* prior brief, at pages 29-30. As explained there, centralized national power will be vastly increased, and state and local power will be correspondingly diminished, if a grant of federal funds enables the national government to lay down governing rules in areas the Constitution otherwise commits to state and local governments.

The need to interpret national powers in a manner that does not obliterate state authority has been recognized by this Court. It said in *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The necessity of harmonizing state and federal powers was also recognized extensively in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), where the Court eloquently said that the concept of federalism means:

> "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Feder-

alism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

C. *When There is a Clash Between National and State Power, the Court Must Engage in a Balancing Test. Under This Test it Should Determine Whether There is Injury to the States' Ability to Govern, and Whether the Asserted Federal Power is Overriding and is Carried Out in the Least Intrusive Manner*

We have shown that the Framers created a federal system in which the national government and the states each possess governing authority. We have also shown that the powers of the national government must be construed in light of the powers of the states and vice versa. Therefore, when there is a clash between a federal law and state power, the Court must first determine whether the federal action injures the ability of states to govern effectively. If the federal act does so, it must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority. In short, the Court must engage in a balancing test of the type it has commonly applied in numerous areas of law.

In *NLC v. Usery*, *supra*, the Court made clear that it had previously adopted such a balancing approach in *Fry v. United States*. The *NLC* Court noted that *Fry* had involved an emergency economic measure necessary to combat an "extremely serious problem which endangered. . . all the component parts of our federal system." 426 U.S. at 853. Only action by the national government could forestall the danger. The federal government's action was merely temporary, and did not "interfere with the States' freedom of action beyond a very limited, specific period of time." It displaced no state choices, and reduced rather than increased the pressure upon state budgets. *Ibid.*

Thus, the *Fry* Court engaged in the very type of balancing process espoused by *amici*: it considered whether

a federal law interfered with state governing authority, whether the law was necessary to accomplish an overriding federal purpose, and whether it furthered that purpose in the least intrusive way.

In considering whether a given federal action is constitutional though it clashes with the governing authority of states, the Court must necessarily take account of the powers involved and the actual facts of the case. As the Court recently said in resolving a clash between the Twenty-first Amendment and the Commerce Clause, it must consider rival powers in "the context of the issues and interests at stake in any concrete case." *Bacchus Imports Ltd. v. Dias*, *supra*, slip op. at 11. Thus, where the national government invokes a power central to its creation, and does so to accomplish purposes also central to its creation, its chances of success will be greater than where it invokes a lesser power or purpose. For example, where the national government invokes the interstate commerce clause to prohibit state discrimination against such commerce or state rivalries which gravely burden the commerce, the federal chance of success will be higher than in cases where it invokes a less central power or invokes the commerce power to regulate some activity which has only a small or remote effect on commerce. Similarly, if the federal government invokes the commerce power to cure a national problem requiring a uniform solution, or to solve a widespread health or economic problem which states cannot address effectively because economic necessity makes them rivals in seeking to attract the industries which cause the problem, then the national government's chance of success will be greater than in cases where it invokes the commerce power though states can and are providing effective answers to problems which are susceptible to local solutions.[4]

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[4] Two cases which were decided after and are progeny of *NLC v. Usery* exemplify situations in which the federal commerce power was invoked to solve crucial national problems which the states themselves had not been able to and probably could not solve. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), the national government addressed serious

Yet, though the national government's chance of success will be greater where it invokes a power central to its creation and does so to accomplish a purpose that is also central to its creation, even here a national power cannot be carried to the point of gravely impairing state authority. The national government could not, for example, limit the number of state employees because it believes they would be more productive in tasks other than those assigned them by states. For the power to determine the tasks of their employees, and the number of workers who shall perform them, is a central feature of states' ability to govern, and is therefore a power which the national government cannot override.

Just as national powers are limited by state powers with which they clash, so too the reverse: state authority is limited by national powers with which it clashes. For example, under the Fourteenth and Fifteenth Amendments, the prevention of discrimination is an overriding national purpose which can be and is carried out by federal legislation. No state possesses the constitutional authority to disregard such legislation. Similarly, there are environmental and energy problems which pose a grave threat to interstate commerce and cannot be solved by states. In such instances, state governing power can be overridden by an exercise of the federal commerce power designed to cure a threat to the national economy.[5]

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environmental problems that eluded state solution. And in *FERC v. Mississippi*, *supra*, the federal government dealt with a national energy crisis that was beyond the capacity of states to overcome. The facts of those cases thus exemplify the need for the type of balancing approach advocated here by *amici* and adopted in *NLC* by Justice Blackmun (426 U.S. at 856), who would allow the exercise of federal authority where there is a demonstrably great national interest.

[5] We note that there are cases in which the federal power to act is for practical purposes indisputable under the balancing test, *e.g.*, a situation in which the national government invokes the war power to stabilize the national economy during a military crisis.

Even in cases involving a clearly applicable national power, the federal government's challenged action must actually further the

D. *The Supremacy Clause, Which Ensures that Constitutional Principles Will Prevail, Cannot be Used to Vitiate Federalism*

Appellant Garcia seeks to evade the need to harmonize federal and state powers. He would resolve in favor of national authority all clashes of power between the national government and the states. Thus, he asserts that the Supremacy Clause removes all restraints upon Congress stemming from the sovereign authority of states. According to his argument the clause establishes unrestricted federal hegemony. He seeks to bolster his argument for uncabined federal power with quotes from the Framers and this Court which purportedly support such an interpretation. *Brief of Appellant Joe G. Garcia on Reargument* (hereinafter "*Garcia Rearg.*") at 4-11.

Garcia's position is untenable. Under the Supremacy Clause the Constitution is the supreme law of the land. Principles of federalism are pervasively embedded in that supreme law. A position which vitiates federalism is thus inconsistent with the Constitution and cannot be maintained. Garcia's position does vitiate federalism by removing all restraints on Congress' power vis-a-vis the states. Thus, his view cannot stand.

Nor is Garcia's position saved by broad statements he cites. Understood in context those statements were designed to *establish* federalism, not to *destroy* it. When the country began and for scores of years thereafter (indeed until the "constitutional revolution" of the late 1930's and early 1940's), the great question was whether the national government would be too weak to achieve the purposes for which it was created or would instead have powers adequate to that end. It was feared that

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federal interest being asserted. The national government's means must be adapted to the substantive end. Moreover, the need for federal action that overrides state power should not be a hypothetically rational construct advanced after the fact by government counsel. Rather, it should be a matter that was considered by Congress itself. Otherwise, the necessary protection received by states under the balancing test could be lessened.

the goal of effective national authority would be thwarted by the vast state powers existing before the Constitution and by the historical fact that, as Madison put it, "the first and most natural attachment of the people will be to the governments of their respective states." *The Federalist No. 45*, *supra*, at 316 [Madison]. Thus, to establish a federal system in which the national government too possessed effective authority, the Framers and this Court often pointed out that the will of Congress would prevail where the federal government had constitutional power. These statements were intended to help ensure the national government would not be weak and helpless because of state power. But statements made to establish federalism by strengthening the national government in the face of powerful states, were not intended to destroy federalism by enabling a central government which has grown huge and powerful to override the proper exercise of authority by now weakened states.[6]

II. The Constitutionally Protected Authority of States Encompasses the Powers Necessary to Govern and Serve Citizens, and the Protection Enjoyed by States Under the Tenth Amendment Extends to Cities and Counties

A. *State Powers Are Not a Closed Catalogue. They Are Broad and Change Over Time as Necessitated by New Economic, Technological and Demographic Facts*

1. Because states have authority which cannot be impaired by the national government, the question arises of precisely which governing powers the states possess. The answer is that there is no closed catalogue of state

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[6] The potential of Garcia's argument to destroy federalism is enhanced because it need not be confined to the commerce clause. (Garcia, indeed, suggests no reason why it should be so confined.) Rather, it extends to any clause granting power to the federal government. Thus no national power would be restricted by principles of federalism, and state power would be diminished accordingly.

powers. Rather, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state." *The Federalist No. 45*, *supra*, at 313 [Madison]. In short, the authority of states encompasses all powers necessary to govern their citizens and serve the public welfare.

Just as state powers are not a closed catalogue, so too they are not static. Rather, they grow and change over time, as necessitated by new economic, technological, and demographic facts. Thus, over time, states and local governments have often begun to provide new services needed by citizens: such services have included public schools, hospitals, fire departments, sanitation facilities, airports and, as in this case, mass transit.

The need for growth and change in state powers is no less today than in former years. For today the states and their subdivisions, the cities and counties, are confronted with a host of nearly intractable problems relating to slums, traffic, schools, noise and air pollution, jobs, welfare and other matters. The states and their subdivisions must therefore possess the authority needed to develop constructive solutions to such overriding contemporary problems.

That the powers of states must and do grow and change as necessitated by the public welfare has long been recognized by leading constitutional scholars. Thus, in his *Constitutional Government in the United States* (1908), Woodrow Wilson said:

> The question of the relation of the States to the federal government . . . cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive state of our political and economic development gives it a new aspect, makes it a new question . . . Our activities change alike their scope and their character with every generation.

And in a similar vein, Justice Black said:

> Many governmental functions of today have at some time in the past been non-governmental. . . . [*T*]*he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires. Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) (emphasis added).

Finally, we note that the necessity for change and growth in state powers is not generically different from the growth which had to occur in federal power from approximately 1880 through 1940. During that period there were constant efforts—often struck down by the judiciary—to expand the federal commerce power so as to solve pressing national economic problems. These efforts received acceptance by this Court at the end of the 1930's and the beginning of the 1940's. The necessary change and growth in the federal commerce power finds a counterpart in changes and growth in state power when this is necessary to enable states and their subdivisions to meet problems which beset the public welfare. Indeed, were federal but not state power to be capable of growth to meet economic and social exigencies, then national authority would continuously expand relative to that of states. The concept of federalism would ultimately become archaic and meaningless.

2. Appellant Garcia seeks to foreclose the necessary growth in state authority. He therefore asserts that a state acts in a sovereign capacity only when it makes and enforces laws, and not when it provides goods and services. Thus, he argues, federal laws necessarily are applicable to the provision of goods and services by states.

Garcia's position is contrary to historical facts and to this Court's jurisprudence. It has always been the function of government to provide services which are best supplied by the public sector. Indeed, the provision of important services is one of the basic reasons for institut-

ing government in the first place. Thus, governments all over the world have provided police protection, military defense, postal services, schools, judicial tribunals, hospitals and other necessities of life.

The services government must provide have naturally grown over time as conditions change, and have come to include many functions which previously were supplied by private parties or which are still supplied in part by such parties. Governments have undertaken such services because private businesses could not or were not serving the needs of citizens on a sufficiently widespread basis or at a sufficiently affordable price. Schools and hospitals are longstanding examples. More recently, numerous additional illustrations have arisen because of the necessities of modern life. Thus, governments around the globe, including the national and state governments in this country, now provide energy, airports, long distance transportation, and local mass transit.

This Court itself has said that supplying services is a fundamental function of state governments, and that such governments are engaged in a sovereign function when they perform the services. Thus in *NLC*, *supra*, the Court said that fire prevention, police protection, sanitation, public health, and parks and recreation are activities "typical of those performed by state and local governments in discharging *their dual functions of administering the law and furnishing public services.*" 426 U.S. at 851 (emphasis supplied). "Indeed", continued the Court, "it is functions such as these which *governments are created to provide*, services such as these which the States have traditionally afforded their citizens." *Ibid.* Furthermore, "the essentials of *state sovereignty*" would be "devour[ed] if the federal government could force upon States its choices of how to operate such activities as schools, hospitals, fire departments and police departments." 426 U.S. at 855.[7]

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[7] That government acts in a sovereign capacity when it provides services needed by citizens is a proposition which is not diminished

B. *The State's Tenth Amendment Immunity Extends to Cities and Counties*

In order to carry out powers they possess under the Constitution, states create cities and counties, which are political subdivisions of the states. Cities and counties represent a state's chosen method of organizing itself for the purpose of carrying out state policy and governing effectively. They "are instrumentalities of the State." *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883). They "derive their authority and power from their respective states," *NLC*, *supra*, 426 U.S. at 855, n. 20, and simply carry out the states' own powers. Thus, "[t]he actions of local government *are* the actions of the state," *Avery v. Midland County, Texas*, 390 U.S. 474, 480 (1968) (emphasis in original), and cities and counties receive the same immunity as the state itself under the Tenth Amendment. As this Court held in *NLC*, *supra*, 426 U.S. at 855, n. 20, the actions of cities and counties are "beyond the reach of Congressional power under the Commerce Clause just as if such services were provided by the State itself."

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by a "scare argument" employed by Garcia. Such argument is that private businesses will be taken over by states if the latter receive Tenth Amendment protection from federal regulation and its attendant costs when supplying goods and services. *Garcia Rearg.* at 40-41.

However, states and local governments do not become involved in previously private businesses, with all their many attendant problems, because federal regulation will thereby become inapplicable. Rather, as indicated above, if state and local entities become involved in formerly private activities, it is because appropriately elected and appointed public officials have determined that private businesses cannot or are not serving the needs of citizens on a sufficiently widespread basis or at a sufficiently affordable cost. This is the history and the reality whether one looks at schools, hospitals, mass transit or other functions. Nor is appellant Garcia able to cite even a single concrete example in which a state or local government became involved in the travails of owning and running a private business in order to oust federal regulation. His argument is merely an intellectual chimera.

The correctness of these principles is emphasized by the fact that the cities and counties often bear the brunt of serious problems besetting the state. They thus need the same latitude to solve the problems as is possessed by the states. For it is cities and counties which massively confront modern problems relating to schools, traffic, slums, welfare, and other matters.

Appellant Garcia argues that cities and counties cannot receive protection under the Tenth Amendment because they are not treated as states under the Eleventh Amendment. But cities and counties *are* treated as states under the Fourteenth Amendment, the Fifteenth Amendment, the obligation of contracts clause, and the just compensation clause. *E.g., Avery v. Midland County, supra; Trenton v. New Jersey*, 262 U.S. 182 (1923). Plainly, their treatment under the Eleventh Amendment does not determine their treatment under other constitutional clauses. Rather, the policies underlying each clause must be and are considered separately. The policies underlying the Tenth Amendment necessitate that cities and counties be treated as states for purposes of that clause because, as said above, they carry out the state's own power, are the state's chosen method of organizing itself, and face the same serious problems that confront the states themselves.[8]

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[8] It is questionable whether there is even any Eleventh Amendment policy which justifies giving cities and counties less immunity under that amendment than is enjoyed by states. In an 1890 case the Court said that cities and counties do not share the states' immunity because they are corporations chartered by the states. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). But counties are *not* corporations, and, with but few exceptions, they do not even have charters. Rather, counties are direct instruments of state sovereignty created by state constitutions or statutes. They have executive and legislative arms, and are subject to the electorate. And while cities are incorporated, they are not like private corporations. Rather, they are governing bodies with governing arms and powers, and they face all the problems of their parent governing bodies, the states.

In a 1926 case the court said cities do not share states' immunity because they are mere "agents" of the state. *Old Colony Trust Co.*

Finally, Garcia relies on the fact that the standards governing the immunity of local governments under the Sherman Act are different from those governing the immunity of states. While several *amici* disagree with decisions treating cities and counties differently than states under the antitrust laws, those decisions nonetheless do not aid Garcia. For under such decisions the cities and counties share the immunity of states so long as the local governments act within authority granted them by states and carry out state policies. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 416-417 (1978). Similarly, *amici's* argument in this case is that cities and counties share the Tenth Amendment immunity of states precisely because the local governments derive their governing authority from the states and carry out state purposes. Thus, as this Court has correctly noted, there is no conflict between decisions under the antitrust laws and decisions protecting cities and countries under the Tenth Amendment. *City of Lafayette, supra*, 435 U.S. at 412, n. 42.

III. In Accordance With Its Historic Role as Arbiter of the Federal System, This Court Must Determine, Under the Tenth Amendment, the Boundaries of Power Between State and National Governments

A. As shown above, the Tenth Amendment embodies principles of federalism and state authority which are basic to the nation. Appellants Donovan and Garcia, however, urge that this Court should refrain from judicially enforcing the Amendment. Donovan's supplemental brief concedes this Court has ruled against the notion that "enforcement of federalism restraints . . . is extrajudicial in nature", but goes on to urge that, instead of enforcing the amendment, the Court should defer wholesale to Congress. *Supp. Br. Sec.* at 14. Garcia's

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v. Seattle, 271 U.S. 426 (1926). But cities and counties are not agents in the sense that an individual is an agent for a corporation or a government. Rather, as stated above, they are governing political instrumentalities with appropriate governing arms, and they share state powers and problems. They also make independent decisions on behalf of their electorate, to which they are responsible.

brief asserts that the courts should leave questions of state power "to the usual processes of political action." *Garcia Rearg.* at 29.

In urging the Court to abstain from enforcing principles of federalism, Donovan and Garcia both assert that Congress and the political processes should be relied upon to protect the states. They also seek to bolster their argument by claiming that judicial standards cannot be derived in the area of federalism.

The argument made by appellants is contrary to the constitutional scheme, contrary to the tenets of this Court's jurisprudence, and contrary to facts.

Questions of federalism—*i.e.*, Tenth Amendment questions—involve the boundaries of power between the national government and the states. In this respect they are precisely like questions of the location of power among the three branches of the national government itself. In both situations the issue is which powers accrue to which organs of government.

It has historically been the role of this Court to determine such questions—to be the arbiter of the federal system. This role has existed at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where, in his masterful discussion of the relative powers of Congress and the courts, John Marshall said "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The Court's role as umpire of the system has been reaffirmed and reapplied throughout American history in many cases of titanic importance to the nation. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*; *Baker v. Carr*, 369 U.S. 186 (1962); *United States v. Nixon*, *supra*. It has been reaffirmed in the face of vigorous claims that the Court should leave to one of the political branches the question of that branch's own power. *United States v. Nixon*, *supra*; *Powell v. McCormack*, 395 U.S. 486, 549 (1969).[9]

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[9] It is true that the Court has deferred to Congress and state legislatures when one or the other has enacted a law regulating

Thus, from the beginning of the nation to our own day the Court has maintained its constitutional role as umpire of the system. It thereby makes a fundamental contribution to the system of checks and balances. This system significantly depends on decisions of power being made not by political officials whose authority is involved and who naturally seek to augment their own role, but by judges who receive life tenure so that they may be insulated from political considerations and may concentrate instead on constitutional ones.[10]

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economic matters and there is no actual clash between state and federal laws. In such cases the Court has applied a presumption of constitutionality. But those cases are far different from ones in which state and federal laws do clash, and the question is whether the state is protected under the Tenth Amendment. For the latter cases involve issues of the boundaries of power between organs of government, which it is the Court's historical duty to determine, and no presumption of constitutionality can be applied because the state and federal laws would *each* be entitled to such presumption if it were utilized.

[10] Appellants seek to elide the Court's constitutional role by claiming that states will receive necessary protection in Congress because the latter "must be presumed to be sensitive to the prerogatives" of state governments. The assertion is highly questionable. For the factors which historically were thought to ensure Congressional sensitivity to states have dramatically changed, and new factors militating against such sensitivity have arisen. *See* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 860-868 (1979). As Justice Jackson eloquently said in discussing modern presidential powers: "it is relevant to note the gap that exists between . . . paper powers and . . . real powers . . . . Subtle shifts take place in the centers of real power that do not show on the face of the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 653 (Jackson, J., concurring).

Thus, it was long thought that Congress was particularly responsive to state governments because Senators and Representatives are elected from the states. Indeed, until the passage of the Seventeenth Amendment, Senators were elected by state legislatures. But Senators are no longer elected by state legislatures, and other factors which gravely lessen sensitivity to state interests have assumed overwhelming importance. Today, huge amounts of money are needed for campaigns; therefore, rather than being tied to

B. Because the Court's historic role is to be the umpire of the system, and an effective system of checks and balances requires that decisions on the boundaries of power not be made by the political officials whose own authority is at issue, it is untenable for appellants to assert that Congress itself should be allowed to determine whether it can override the authority of the states. Such assertion contravenes fundamental principles. It also opens the door to major intrusions on state power as well as to small intrusions that " 'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.' " *FERC v. Mississippi*, *supra*, 456 U.S. at 774-775 (Powell, J., concurring and dissenting) (citation omitted).

Appellant's position is not rescued by the Solicitor General's contention that adjudication of Tenth Amendment questions may sometimes require consideration of complex facts bearing on governmental processes. In determining the boundaries of power, this Court has often had to take account of such facts; sometimes, indeed, the facts were alleged to threaten catastrophe to the nation. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. The existence of complex facts did not cause the Court to shrink from its duty of adjudication, however.

Moreover, the majority and dissenting members of the Court have considered complex facts in Tenth Amendment cases no less than in other cases. See *FERC v. Mississippi*, *supra*; *EEOC v. Wyoming*, *supra*. And, as

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state interests, Senators and Representatives must secure funds from and espouse the causes of political action committees and special interest groups. Access to media has become a major factor in securing election, and enables candidates to bypass state political organizations. Candidates who have built national reputations move to and are elected from states with which they have little historic tie. The power of state political parties over national representatives has greatly declined. Thus, the assertion that the Court should refrain from upholding federalism because Congress will protect the states is not only inconsistent with longstanding constitutional history and jurisprudence, but has become very questionable on the facts.

recognized in both *NLC* and *EEOC*, there will be times when the effects of salient facts will be obvious. *NLC v. Usery*, *supra*, 426 U.S. at 846; *EEOC v. Wyoming*, *supra*, —— U.S. at ——-, 103 S.Ct. at 1063.

C. Appellants are also incorrect in asserting that judicial standards cannot be derived in the area of federalism. As said earlier, in protecting vital principles of federalism under the Tenth Amendment, the Court should employ the same type of test used in other areas of constitutional law, and used in the *Bacchus* case, *supra*, as recently as June 1984 in determining whether state or federal power shall prevail. That is, the Court should harmonize state and federal power by means of a balancing test under which it considers whether state governing authority is being impaired, whether the national government's law furthers an overriding federal interest, and whether the law is tailored to achieve the federal interest with the least harm to state authority.

IV. Under the Balancing Test the FLSA Cannot Be Applied to Publicly Owned Mass Transit Systems

Under the balancing test propounded by *amici*, publicly owned mass transit systems are protected by the Tenth Amendment against application of the Fair Labor Standards Act (FLSA). For when applied to publicly owned mass transit, the FLSA impairs vital governing interests of state and local jurisdictions, furthers no overriding federal interest, and is not tailored to accomplish a federal interest in the manner least harmful to state and local power. This is made clear by matters stated at length in *amici's* initial brief (hereinafter cited as "*Prior Brief*"). Because of limitations of space, such matters shall only be recapitulated in a cursory way here. For a fuller exposition of them *amici* respectfully refer the Court to the earlier brief.

A. To begin with, publicly owned mass transit is a vital governing function of local jurisdictions. It serves critical needs of tens of millions of their citizens, especially minorities, the poor, the elderly, and the handicapped. *Prior Brief* at 3. It is also critical to business

development in urban areas, and to avoid further pollution and traffic congestion. *Id.* at 2, 3.

Thus, publicly owned mass transit systems are one of the vital infrastructure services of urban areas. *Prior Brief* at 4, 18-19, 20-21. Local governments have historically provided a host of important infrastructure services, *id.* at 18-19, 20-21, and long were directly involved with transportation infrastructure services in two different ways. "'[F]rom time immemorial'" local governments built and maintained roads, *id.* at 20, quoting *Molina Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir. 1982), and for many decades they extensively regulated privately owned transit systems. *Id.* at 4-5.

Ultimately, citizens' vital need for mass transit services made it necessary for local governments to go beyond regulation of transit, and to own mass transit systems instead. For transit systems long ago became unprofitable for private companies, which began to go out of business in droves. *Prior Brief* at 5. This spelled disaster for tens of millions of citizens. *Ibid.* To prevent an urban debacle, local governments had to take over the ownership of mass transit systems all over the country. *Ibid.* Thus by 1980, public transit systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. *Id.* at 2.

The provision of mass transit services by public entities is not a profit-making operation. Rather, mass transit is provided at huge losses to serve the public good. *Prior Brief* at 7, 22. The losses are financed and subsidized by local governments in the same way that they finance and subsidize other basic public services. *Id.* at 7. Mass transit systems are also administered by local governments in the same way as other basic public services. *Id.* at 6-7.

For all these reasons, then, the provision of mass transit services is an essential governmental function of local jurisdictions.

B. Not only is mass transit a vital governmental function of local jurisdictions, but this case also involves another essential function of state and local governments: the power to set the wages of their employees. This power is crucial to state and local governments because it involves their budget priorities and their ability to adequately provide services. Thus, this Court recognized in *NLC v. Usery* that the authority to establish the wages of such employees is a fundamental attribute of state sovereignty. 426 U.S. at 845.

C. Federal regulation under the FLSA would gravely impair the essential functions of local governments at issue here. For the FLSA does not take account of the fact that publicly owned mass transit systems must develop innovative work schedules; it does not take account of the need for split shifts or of the fact that transit workers receive premium compensation for a significant portion of their regular work week. *Prior Brief* at 9-10, 25-26. Application of the FLSA would result in dramatically increased costs and losses for public transit systems and would adversely affect the ability of local governments to adequately provide a service essential to scores of millions of citizens. *Ibid.*

D. Federal regulation under the FLSA will not serve any overriding interest of the national government. Public transit workers receive wages three times as high as the minimum wage prescribed by the FLSA, and their wages have long exceeded or been closely comparable to those of workers in numerous well-paid lines of employment. *Prior Brief* at 7-8, 27. Transit workers also have fair working hours. *Id.* at 9-10, 25-26.

Moreover, public transit workers are in a much different strategic position than the victimized employees for whom the FLSA was enacted. *Prior Brief* at 9. A strike by public transit workers could cripple a city, and these workers therefore have a powerful bargaining position that generally is secured by mediation or com-

pulsory arbitration. Transit employees are thus assured of fair treatment.[11]

E. Finally, the FLSA is not tailored to further a federal interest in a manner that works the least harm to the ability of local jurisdictions to perform a crucial governmental function. To be so tailored the FLSA would have to take account of the need to have split shifts and to provide premium pay for a significant number of normal working hours. But as said above, the FLSA does not consider these matters. Instead it imposes wage and hour requirements that limit the flexibility of publicly owned mass transit systems, that would greatly increase the costs and losses of these systems and that would decrease their ability to adequately serve the public.[12]

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[11] The foregoing federal interests expressed in the FLSA are the only ones at issue here. There is not and could not be a claim that any other federal interest is at stake. Thus there is no claim that application of the FLSA to transit workers is necessary to assure the adequate purchasing power upon which the national economy depends. Nor is there any claim that federal regulation is necessary because state and local governments have been unable to derive local solutions for labor problems having a serious adverse national impact. All such claims would be frivolous.

[12] The brief of the Solicitor General seeks to elide these points by claiming that, under 29 U.S.C. 207(e)(5) and (7), the FLSA "expressly provides for exclusion of various forms of 'extra compensation' in establishing an employee's regular rate of pay." Thus, says the Solicitor General, "it has never been determined . . . that existing premium pay arrangements [for public transit workers] must be treated as part of the 'regular rate' to which overtime is applied." *Supp. Br. Sec.* at 29-30, n. 11.

The Solicitor General's interpretation of the law is insupportable on the face of the statute—it is indeed contradictory to the plain language of the statute. To be excluded under § 207(e)(5) from the employee's "regular rate" of pay, premium payments must be made for hours worked (1) in excess of eight per day, or (2) in excess of the employee's normal or regular hours, or (3) in excess of his maximum workweek. But the premium payments made by public mass transit systems are for work done *within* these limitations, not *in excess* of them. That is, they are for work that is part

V. The Three-Pronged Test Currently in Use is Unsatisfactory. It Fails to Protect Federalism and Each Prong Gives Rise to Serious Difficulties

Amici believe the balancing test described above should replace the current three-pronged test developed under *NLC* and its progeny.[13] In *amici's* view, the three-

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of the employee's eight hour workday, and that is within his regular and normal workday and workweek. Thus, under § 207(e)(5) such premium payments are *not* excludable from the employee's regular rate.

To be excludable under § 207(e)(7) from an employee's regular rate, premium payments must be made for work in excess of the employee's normal or regular workday or workweek and must be at least one and one-half times the rate established for such workday or workweek. But, again, the premium payments made by public transit systems are for work done *within* the regular workday and workweek. Nor are they necessarily one and one-half times the rate for such workday or workweek. For both these reasons they are not excludable from the regular rate under § 207(e)(7) either.

Finally, after erroneously claiming that under the statute premium payments are excludable from the regular rate, the Solicitor General argues that, even if they are not excludable "in some cities," the FLSA would not require "that overtime be paid on the basis of such premium rates in the future." For "it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased." This argument, of course, is a direct concession that the FLSA *would* interfere with local governments' ability, under existing arrangements, to carry out the important function of providing mass transit. The argument also is a burdensome demand that, to satisfy the FLSA, local governments should renegotiate carefully drafted and often controversial collective bargaining agreements.

[13] If the three-pronged test were to remain the governing standard under the Tenth Amendment, then it should be construed in accordance with principles urged in *amici's* briefs. Under those principles the judgment in favor of appellees must be affirmed.

We also note that the balancing test suggested by *amici* has elements in common with two doctrines utilized under the three-pronged test. One such doctrine is the Court's oft-repeated statement that Congress cannot " 'exercise power in a fashion that impairs the States' . . . ability to function effectively in a federal

pronged test is unsatisfactory because it fails to protect federalism and because each of the prongs presents serious intellectual and practical difficulties.[14] That the test provides little protection for federalism is shown by the fact that it seems to be extraordinarily difficult for state and local power to survive under it. State and local power has been defeated in every case decided under the test in this Court and in nearly every one of the large number of cases decided under the test in lower courts.[15] Furthermore, such losses can be expected because, as shown by

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system.'" *NLC v. Usery, supra*, 426 U.S. at 843, quoting *Fry, supra*, 421 U.S. at 547; *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678, 686-687 (1982). The other is that, even if the three-pronged test is met, the state or local interest might be overridden if the federal interest is powerful enough to justify submission.

[14] While *amici* strongly disagree with the three-pronged test, they find it understandable that its various prongs were developed in cases subsequent to *NLC v. Usery*. For a number of those cases exercised hydraulic pressures upon the decisionmaking process. *See, e.g., Hodel v. Virginia Surface Mining and Reclamation Association, Inc., supra*, and *FERC v. Mississippi, supra*. Such cases presented critical national economic problems relating to energy shortages and despoliation of the environment. Individual states were unable to solve the problems, in part because they were rivals in promoting the industries which caused them. Extensive hearings on the problems had been held by organs of the federal government, and national solutions had been painfully worked out over extensive periods of time. In the circumstances there were hydraulic pressures to aviod striking down the crucial federal efforts, and it is understandable that the cases resulted in standards adverse to state power.

[15] In addition to cases cited in *amici's* initial brief (p. 8, n. 7), *see, e.g., Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981); *Hughes Air Corp. v. Public Utilities Commission of the State of California*, 644 F.2d 1334 (9th Cir. 1981); *United States v. Helsley*, 615 F.2d 784 (9th Cir. 1979); *Vehicle Equipment Safety Commission v. National Highway Traffic Safety Commission*, 611 F.2d 53 (4th Cir. 1979); *Public Service Co. of North Carolina v. Federal Energy Regulatory Commission*, 587 F.2d 716 (5th Cir. 1979); *Hewlett-Packard v. Barnes*, 425 F.Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir. 1978); *Standard Oil Co. v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977); *Friends of the Earth v. Carey*, 552 F.2d 25

an analysis of each of the three prongs, they inherently are a graveyard for state and local powers.

A(i). The first prong is that federal action must regulate the state *qua* state. This prong enables the national government to defeat state governing authority by directing its action toward private parties instead of overtly regulating the states. In this way the national government can override state power, without possibility of Tenth Amendment challenge, even in areas that may properly be within the governing province of state and local governments.

The point can be illustrated by numerous examples. For instance, this Court has ruled that state and local governments have the power to locate their capitals where they wish. *NLC v. Usery*, *supra*, 426 U.S. at 845, citing *Coyle v. Oklahoma*, 221 U.S. 559 (1911). The same would be true regarding state schools, libraries, hospitals and abortion clinics. A federal law which says "the state of X shall not locate" one of these institutions in a particular area is a regulation of the state *qua* state. The law therefore would be challengeable under the Tenth Amendment. But the national government could escape this limitation on its power by simply saying that "no individual shall participate" in constructing the institution in a particular area. Because the federal law is now addressed to individuals rather than the state, it is now unassailable under the Tenth Amendment.

The same type of example can be extended into every single area of state and local authority, and the argument has in fact been used by the national government in various areas of state power. Thus, the point applies whether one is discussing work done by state and local employees (as in the current case), speed limits applied on local roads, state efforts to stop pollution, state and local efforts to cure slums, or any other matter. In every instance, state authority can be thwarted by simply

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(2d Cir. 1977); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977).

addressing a federal law to individuals rather than to the state itself. The state *qua* state requirement thus provides the national government with a ready escape from Tenth Amendment limitations on its power.

(ii). The national government argues for retention of the state *qua* state requirement. It says the requirement is necessary because Congress possesses exclusive and undivided power over interstate commerce, and can preempt state laws regulating private activity that affects such commerce. For these reasons it asserts that the Supremacy Clause demands the requirement. *Supp. Br. Sec.* at 10-11.

Of course, it is incorrect to assert that Congress has sole power over interstate commerce. As recognized in cases from John Marshall's time to the present day, the states too have power over aspects of such commerce. *E.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). This is even more true now than in former years, since today the concept of interstate commerce has been expanded to the point where it encompasses actions which are basically local in character though they have some small or remote effect on interstate commerce.

Beyond this, there is no reason why the state *qua* state requirement is needed to carry out Congress' power to regulate interstate commerce. In appropriate cases that power can prevail regardless of whether a federal action is directed to states or to private parties. The commerce power is central to the creation of the national government. If it is invoked for purposes also central to such creation—*e.g.*, to stop state discrimination against interstate commerce—and if its use is tailored to accomplish the federal objective with the least harm to state authority, then the federal action will prevail.

Finally, the Supremacy Clause in no way mandates the state *qua* state requirement. The Clause says that the

Constitution and laws of the United States pursuant thereto are the supreme law of the land. This mandate has nothing to do with whether a Congressional law affects private parties or states.

B. The second prong is that the federal action must affect "indisputabl[e] 'attribute[s] of state sovereignty'." *Hodel, supra*, 452 U.S. at 287-288, quoting *NLC, supra*, 426 U.S. at 845. This prong causes "difficulties," since its meaning is "somewhat unclear" and there has been "little occasion to amplify on our understanding of the concept." *EEOC v. Wyoming, supra*, —— U.S. at ——, 103 S.Ct. at 1061 & n. 11. Beyond this, the concept seems redundant and unnecessary because any power required for states to effectively govern and serve their citizens should be an attribute of state sovereignty.

Moreover, the requirement that a power be an *indisputable* attribute of state sovereignty is enormously destructive of state power and of federalism. For the state and its sovereignty can continue to exist even if numerous powers are stripped from it, and such powers thus are not *indisputable* attributes of state sovereignty. For example, the state and its sovereignty can exist even though the state does not provide schools, or even though it does not provide hospitals and other health facilities, or even though it does not provide parks and recreation facilities, or even if it does not provide fire protection, or even if it does not clear away slums. The powers necessary to do these things are thus not *indisputable* attributes of sovereignty, and under the second prong would be ineligible for Tenth Amendment protection even though the Court has already stated in *NLC* and its progeny that many of these powers *are* attributes of sovereignty.

C. The third prong is that federal action must "directly impair [the states'] ability to structure integral operations in areas of traditional governmental functions." *Hodel, supra*, 452 U.S. at 288. There are several unsatisfactory aspects of this prong.

The requirement that an impairment be "direct" enables the federal government to injure state governing power by methods that are *indirect*. For example, as discussed earlier, the federal government could impair state authority by couching a law in terms of what individuals can do rather than in terms of what states can do. The *direct* effect of the law would be on persons but the law would *indirectly* strip the states of governing authority.

The requirement that federal action affect "integral operations" is unclear. If the phrase "integral operations" encompasses all parts of a state's activities—as would seem dictated by dictionary meanings—then it adds nothing and is for practical purposes meaningless. On the other hand, if it means matters which are essential to the existence of the state, then it excludes from protection numerous activities normally associated with states. For, as said above, states can exist though they do not provide schools, hospitals, parks, etc.[16]

Finally, the requirement that federal action affect "traditional" governmental functions is unclear, has produced extensive litigation (as in this case), and can be used to prevent states from exercising powers essential to coping with new economic, technological and demographic facts. That indeed is how some lower courts have used it in mass transit litigation. In such cases certain lower tribunals have held that the powers of state and local governments are confined by the situation which existed decades ago. See, *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983), petition for cert. filed sub nom. *Macon v. Joiner*, No. 82-1974, 51 U.S.L.W. 3884. Such holdings have arisen though this

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[16] If these or similar activities were excluded from "integral operations," such exclusion would be inconsistent with the essential principle that, subject to the limitations of the federal and state constitutions, the states may perform any function which is necessary to serve their citizens and is authorized by appropriate state governmental processes.

Court made clear, in *LIRR*, *supra*, 455 U.S. at 686, that the concept of traditional governmental functions "was not meant to impose a static historical view of state functions."

The historically frozen view adopted by some lower courts is being pressed upon this Court by the federal government. Thus, in its initial brief, the federal government said that "primacy" must be given to history in determining whether an activity is a traditional governmental function under the third part of the three-pronged test. *Brief for the Secretary of Labor* at 25. The government urged that mass transit does not meet the 'primacy" standard because mass transit systems historically were owned by private companies. *Id.* at 16-18. In its supplemental brief, the government says the standards for determining if an act is a traditional function "should be essentially, if not exclusively, an historical one." *Supp. Br. Sec.* at 17. Under this standard the federal law will prevail "where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area." *Id.* at 21.

The supplemental brief says its suggested test "does not adopt a 'static historical view of state functions.' " Rather, the test is "workable" because it "allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority." *Supp. Br. Sec.* at 22-23. It also is said to prevent Congressional action from "drift[ing] into a status of unconstitutionality at some unascertainable future time." *Id.* at 24.

However, though the federal government has engaged in some verbal modifications of its position, it still is asserting the kind of static historical test that has been eschewed by this Court and that thwarts the need of state and local governments to assume new functions as required by changes in economic, technological and demographic facts. The federal government's new test would

freeze state powers as of the date of initial federal regulatory action, which often will be tens or scores of years ago (as in this case). States faced with new and far different problems, which must be solved if the interests of citizens are to be protected, will be disabled from acting in the public welfare unless they submit to federal rules—rules that may be outdated and ineffective, and that too commonly take little account of local needs. Rather than having "ample latitude for experimentation with, and expansion of, their services", states will be stifled unless they conform to federal demands. Whether the subject is schools, traffic, sanitation, pollution, hospital services, welfare or topics yet unknowable, states will be unable to meet new and changing needs free of the hand of the federal government laid on in times past.

The undesirability of the test now urged by the federal government is thus self evident. It is not to be escaped by arguing that the test "prevents the erosion of federal authority." States do not act because they wish to erode federal authority. They act to solve problems. Often they are compelled to act precisely because the exercise of federal authority has *failed* to solve the problems.

Nor can the undesirability of the federal government's test be escaped by arguing that it prevents federal action from "drifting" into unconstitutionality. Earlier federal action will *not* be unconstitutional except insofar as it prevents states from later undertaking efforts needed to govern effectively.[17] Moreover, even if the judicial view of the lawfulness of federal legislation were to change as real-world facts change or as the understanding and perception of them changes, this certainly is no new departure in constitutional adjudication. Rather, such change in constitutionality has been the life-

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[17] In analogous situations this Court has often ruled that statutes lawful on their face are unconstitutional as applied to specific fact situations.

blood of the living Constitution. This Court's view of the federal government's power to regulate economic affairs changed dramatically earlier in the century as economic facts came to be better understood. The power of government to act against certain unpopular groups receded at the hands of the judiciary as perceived threats to the country receded. The legality of malapportioned legislatures changed as the consequences became more dramatic. The rights of those accused of crime have been altered, often at the request of the national government, as judges came to a different appreciation of the results of governing rules. Thus, the possibility of changes over time in perceptions of whether federal action is lawful under the Tenth Amendment is no argument for denying protection to states. It is, rather, an example of the vitality of the Constitution.

D. Thus, each prong of the three-prong test has serious deficiencies, and individually and collectively the prongs gravely impair the power of states in our federal system. Rather than follow the three-pronged test, the Court should adopt the balancing test urged by *amici*. That balancing test is fair to both the national and state governments, is consistent with federalism, and comports with the balancing approach followed by this Court in many other areas of the law.

CONCLUSION

For the foregoing reasons, and those stated in *amici's* prior brief, this Court should affirm the decision below.

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